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JOSEPH F. SPANIOL, JR.  
CLERK

No. 89-1773

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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SUZANNE E. GWIN,  
Petitioner,

v.

G.D. SEARLE AND CO., a Corporation,  
Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

PETITIONER'S REPLY BRIEF

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Of Counsel:	A. John Merlo
David Schultz	Counsel of Record
801 12th St., Ste. 600	645 Normal Avenue
Sacramento, CA 95814	Chico, CA 95928
(916) 444-7552	(916) 343-3513

July 16, 1990

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The petitioner, Suzanne E. Gwin, submits this Reply Brief to Respondent's Brief in Opposition, respectfully pointing out that Respondents have attempted to misstate and narrowly restrict the question raised by Petitioner, in that the issues Petitioner seeks to have this

Court review were raised and involved in the lower courts, and further, that such issues sought by Petitioner for review are consistent with the Considerations Governing Review on Writ of Certiorari suggested in Supreme Court Rule 10.1.

**A. THE QUESTION AS TO WHETHER PETITIONER WAS DENIED PROCEDURAL DUE PROCESS WAS TIMELY RAISED.**

The issue of whether Petitioner was denied procedural due process as adopted by this court (Pet. at i) was raised in both the District and Appellate Courts.

In the District Court, the procedural due process issue raised was Petitioner's lack of notice.

"Plaintiff asserts that judgment in this action should be set aside because she nor her counsel received (1) the notice of hearing .... the order re dismissal ...." (Pet. at 6a<sup>1</sup>)

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<sup>1</sup> Page references ending in "a" are pages in the appendix to the petition for writ of certiorari.

In the Court of Appeal for the Ninth Circuit, Petitioner's Brief of Appellant argued that the limited hearing provided by the District Court was inadequate, and that counsel should have been afforded an opportunity to establish the proper evidentiary standard and to orally argue the merits of her motion before the court.

"The Court Abused Its Discretion by Vacating The Hearing And Precluding Oral Argument.... oral argument is particularly appropriate and necessary .... Counsel should have been afforded an opportunity to establish the proper evidentiary standard and argue the merits of the Motion...." (Brief of Plaintiff-Appellant to the Ninth Circuit, page 20)

Respondent's position that Petitioner raised the issue as to whether her due process rights were violated for the first time in Petitioner's Petition for Rehearing to the Ninth Circuit is totally without merit. (Respondent's Brief at 3 and 5)

Petitioner raised the issue in the lower Courts of lack of notice when her case was summarily dismissed by the District Court. Without notice there can be no hearing, and there can be no due process as adopted by this court.

Further Petitioner raised the issue to the Ninth Circuit of the defective hearing provided in the District Court on her Fed. R. Civ. P. 60(b)(6) motion. (see above excerpt of Plaintiff-Appellant's Brief) More particularly, the defects of the hearing relate to the factual questions that were determined by the District Court in resolving the 60(b)(6) motion. (see Pet. at 23-25, The Risk of Error)

"The fundamental requirement of due process is the opportunity to be heard at a "meaningful time and in a meaningful manner." (citations)" Mathews v. Eldridge, 424 U.S. 319, 333 (1976)

Respondent's argument that due process was never raised below is totally without merit. (Respondent's Brief at 4-5) Quite clearly, due process is nothing more than the sum of its parts, notice and a meaningful hearing. Lack of notice and a meaningful hearing were the basis of Petitioner's 60(b)(6) motion and appeal to the Ninth Circuit respectively.

The Ninth Circuit, although invited to, did not address due process in their decision, and primarily relied upon the fact finding of the district court. (Pet. at a14-a20) This due process oversight by the Ninth Circuit's decision was brought to the their attention by the Petitioner's Petition For Rehearing to the Ninth Circuit.

"... the failure to afford Gwin an opportunity to be heard and to present oral testimony by the District Court on Gwin's motion for relief under Rule 60(b)(6) is a denial of the constitutional right to due process..."

(Appellant's Petition for  
Rehearing at 10)

Further, Respondent's argument is wholly inconsistent. Respondent claims, in the first instance, that since the specific term "due process" was not used by Petitioner in her opening brief to the Ninth Circuit, Petitioner could not have raised the issue of due process. Yet, in the second instance, Respondent claims that when the Ninth Circuit applied a "Material Assistance" test the Court considered relevant due process issues when there is no mention of the specific term "due process" in the Ninth Circuit's decision. (Respondent's Brief at 12) (also see: Ninth Circuit's decision at Pet. a14) Accordingly, Respondent's argument is inconsistent and changes without a rational basis.

**B. THE ISSUES RAISED BY PETITIONER MEET THE SUGGESTED STANDARDS FOR REVIEW SET FORTH IN SUPREME COURT RULE 10.1.**

When a Plaintiff is injured such that the right effected by the injury is fundamental, whether it is a right to bear children, a right to seek gainful employment, or otherwise, due process of law is guaranteed by the Fifth Amendment to the United States Constitution when the party seeks a remedy for the injury to that right.

A decision by a United States Court of Appeals which deprives the Plaintiff of due process is a departure from the accepted and usual course of proceedings adopted by this Court. (See: Pet. at 31) Thus, it calls for exercise this Court's power of supervision.

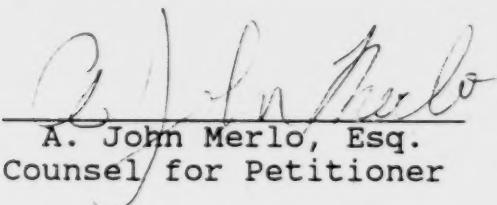
"The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reason that will be considered: [Par] (a) When a United States court of appeals ... has so far departed from the

accepted and usual course of judicial proceedings,... as to call for an exercise of this Court's power of supervision. (Sup. Ct. R. 10.1)

### CONCLUSION

The issues raised by the Petitioner were properly brought before this court. A grant of certiorari should be made.

Respectfully Submitted,



A. John Merlo, Esq.  
Counsel for Petitioner

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David Schultz	Counsel of Record
801 12th St., Ste. 600	645 Normal Avenue
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